

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ONODERA ALLEN,

Defendant-Appellant.

UNPUBLISHED

January 28, 2000

No. 210723

Recorder's Court

LC No. 97-002659

Before: Zahra, P.J., and Saad and Gage, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529; MSA 28.797, assault with intent to do great bodily harm, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to concurrent terms of six to fifteen years in prison for the armed robbery conviction, and five to ten years in prison for the assault with intent to do great bodily harm conviction, both of which were consecutive to two years in prison for the felony-firearm conviction. We affirm.

Defendant's sole issue on appeal is that his trial counsel made serious errors that were so glaring and material that he was denied the effective assistance of counsel guaranteed under the Michigan and United States Constitutions. The right to effective counsel guaranteed in this State was addressed in *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). In order to establish ineffective assistance of counsel, defendant must prove that: (1) trial counsel's performance fell below an objective standard of reasonableness; and (2) but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.*

Regarding the first element, competent counsel is presumed as a matter of law. *People v Wilson*, 180 Mich App 12; 446 NW2d 571 (1989). A reviewing court starts with a strong presumption that any challenged conduct was sound trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). Appellate courts must remain ever mindful of the stress, intensity and rapid pace of a trial. An appellate court should refrain from substituting its collective judgment reached with the benefit of hindsight, for that of trial counsel, whose judgment was exercised in the heat of trial. As our Supreme Court warned, "it is all too easy for a court, examining counsel's defense after it has

proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” *People v Reed*, 449 Mich 375, 396; 535 NW2d 496 (1995).

The second element of an ineffective assistance of counsel claim requires proof from defendant that as a direct consequence of his trial counsel’s substandard performance there is “a reasonable probability that, absent [trial counsel’s] errors, the fact finder would have had a reasonable doubt respecting guilt.” *Pickens, supra* at 313 quoting *Strickland v Washington*, 446 US 668, 695; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Black’s Law Dictionary, Sixth Edition, defines “probability” as:

Likelihood; appearance of reality or truth; reasonable ground for presumption; ... A condition or state created when there is more evidence in favor of the existence of a given proposition than there is against it.

Thus, it is not enough to sustain the high burden placed upon a defendant claiming ineffective assistance of counsel that there exists a possibility that had trial counsel’s performance not fallen below minimal professional standards defendant would not have been convicted. Defendant must establish that it is more likely than not that but for counsel’s unprofessional errors, he would have been acquitted. It is with this standard in mind that we review defendant’s claims of ineffective assistance of counsel.

Without the benefit of an evidentiary hearing, it is impossible to determine why counsel failed to call a physician or therapist as a witness. Given *Mitchell, supra*, defendant’s counsel’s failure to call a physician or therapist is presumed to be trial strategy and, therefore, cannot be considered performance falling below professional norms. Likewise, defendant also fails to show that, had his attorney called a physician or therapist as a witness, the result of the proceeding would have been different.

Defendant testified that he could not use his right hand. Defendant illustrated this when he was asked during his testimony to move his fingers on this right hand. Defendant testified that he could not use his right hand to grasp anything or lift anything heavy. Defendant also testified that he could not hold a gun with his right hand. Furthermore, defendant’s mother testified that defendant could not grasp anything with his right hand. Defendant’s mother also testified that defendant could not feed himself or pick anything up with his right hand. The jury heard a substantial amount of testimony regarding defendant’s inability to use his right hand. Given that testimony, defendant failed to show that the result of the proceeding would have been different if the jury heard more testimony about his right hand.

Furthermore, the evidence presented at trial overwhelmingly supported the conclusion that defendant used a gun to rob the victim. The victim testified that the man who robbed her was wearing a cast on his right arm and that the man was holding a gun in his right hand. The victim followed the man after he ran away with her purse and coat. She also witnessed the man shoot at her as she was following him in her car. The victim observed the man get into a green Grand Am with her purse and coat, and she followed the car until it crashed into a tree. The victim testified that the man that was pulled out of the car was the same man who robbed her. Additionally, Officer McCabe testified that the victim’s purse was found at defendant’s feet when Officer McCabe was helping get defendant out of the car. Two ski masks were found in the pockets of the Nautica jacket found in the car. Given the

overwhelming evidence of defendant's guilt, defendant failed to show the result of the proceeding would have been different if defendant's counsel had called a physician or therapist as a witness.

Affirmed.

/s/ Brian K. Zahra

/s/ Henry William Saad

/s/ Hilda R. Gage